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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 557

GRANT THORN, GENEVIEVE U. THORN; GRANT THORN, GENEVIEVE U. THORN and SAMUEL UHLFELDER, Directors in Trust for Stockholders, Members and Creditors of Eastern Tar Products Corporation; GRANT THORN, GENEVIEVE U. THORN and SAMUEL UHLFELDER, Directors in Trust for Stockholders, Members and Creditors of Eastern Road Materials Corporation,

Appellants,

vs.

HARRISBURG TRUST COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants submit herewith their Jurisdictional Statement as required by Rule 15 of the Rules of the Supreme Court of the United States.

OPINION BELOW

The Appellants refer this Honorable Court to the opinion of the United States Court of Appeals for the Third Circuit dated April 8, 1964, printed on Page 8 of the Appendix, the order of said United States Court of Appeals for the Third Circuit dated April 8, 1964, printed on Page 10 of the Appendix, the District Court's Memorandum of Decision dated June 26, 1963, printed on Page 11 of the Appendix and the Order of the District Court dated June 26, 1963, printed on Page 17 of the Appendix.

GROUNDS OF JURISDICTION

The Appellants submit and aver that this Appeal is authorized by 26 Statutes at Large Chapter 517, Page 827 (1891) of the Acts of Congress of the United States.

The case at bar involves the construction and application of the Constitution of the United States. The application of laws, rules, and principles in the case at bar have deprived the Appellants of due process of law. The Appellants submit that an examination of the record in this case will substantiate the Appellants' allegations that the Supreme Court of the United States has jurisdiction in this case.

The order appealed from in this matter is the order of the United States Court of Appeals for the Third Circuit dated April 8, 1964, (printed on Page 10 of the Appendix).

The Notice of Appeal to the Supreme Court of the United States was filed on July 6, 1964, in the United States District Court for the Middle District of Pennsylvania.

The issue before the Supreme Court of the United States involves the application of the Rules of Civil Procedure in the Federal Courts of the United States as authorized by the Constitution of the United States. The Appellants submit that the application of these rules have deprived them of due process of law.

In "Winters vs. People of State of New York", 333 U.S. 507, the Supreme Court held that if the application of a State Statute violated due process of law then such decision would be subject to a direct appeal to the Supreme Court.

In "Fay vs. Noia", 372 U.S. 413, the Supreme Court stated that the scope of due process of law not only comprehends the right to be heard but also procedural rights.

In "Boske vs. Comingore", 177 U.S. 459, the Supreme Court stated that the question of whether or not the Constitution of the United States allows certain regulations adopted by a governmental agency as having the force of law is one that involves the construction and application of the Constitution of the United States, within the meaning of the provision of the Acts of Congress of March 3, 1891, with respect to appeals to be taken from the District or Circuit Courts direct to the Supreme Court of the United States.

In "Wiley vs. Sinkler", 179 U.S. 58, the Supreme Court stated that a right which has for its foundation in the Constitution of the United States is a case involving a question which may be brought directly from the Circuit Court to the Supreme Court of the United States.

The Plaintiffs submit and aver that the application of the Federal Rules of Civil Procedure by the District Court, which ruling was affirmed by the United States Court of Appeals for the Third Circuit, has deprived the Appellants of due process of law and is a question involving the application of the Constitution of the United States.

QUESTION PRESENTED

Has the application of the Constitution of the United States, and the Rules of Court authorized thereunder, deprived the Plaintiffs of due process of law?

STATEMENT OF THE CASE

The proceedings in the Court below involve a suit by Grant Thorn, Genevieve U. Thorn; Grant Thorn, Genevieve U. Thorn and Samuel Uhlfelder, Directors in Trust for Stockholders, Members and Creditors of Eastern Tar Products Corporation; Grant Thorn, Genevieve U. Thorn and Samuel Uhlfelder, Directors in Trust for Stockholders, Members and Creditors of Eastern Road Materials Corporation against Harrisburg Trust Company. The original suit in this matter was filed September 20, 1955, but was not prosecuted because Grant Thorn, one of the Plaintiffs and Trustees herein, was under a Federal Tax Lien, his assets were frozen and he was unable to obtain necessary funds in order to prosecute the case in question. On September 30, 1958, the present suit was filed within the applicable time allowed by the Statute of Limitations. The Defendant attempted to take the deposition of one of the Plaintiffs, Grant Thorn, but said Plaintiff was unable, because of illness and physical disability, to appear for said deposition. No attempt was made to take the deposi-

tion of any of the other Plaintiffs, and no attempt was made by the Defendants to obtain a trial date for a hearing on the merits of the case. On April 6, 1962, a hearing was held in the United States District Court for the Middle District of Pennsylvania on the Motion of the Defendant to dismiss the Plaintiffs' Complaint as a result of the failure of one of the Plaintiffs, Grant Thorn, to appear for a deposition. Although Mr. Thorn's doctor, as well as all of the Plaintiffs were in Court on said date, no testimony was requested or presented concerning Mr. Thorn's past or present physical condition and in connection with the reasons for his past failures to appear for depositions. On April 26, 1962, the trial Court entered an Order dismissing the Plaintiffs' case on the theory that the Plaintiff, Grant Thorn, willfully failed to appear at a deposition. This decision was appealed to the United States District Court for the Third Circuit and on February 28, 1963, the said Appellate Court affirmed the District Court after refusing to consider medical reports and affidavits concerning Grant Thorn's physical condition on the ground that such evidence should have been presented at the hearing before the District Court on April 6, 1962; and as same was not so introduced in the evidence at the hearing in the District Court, it could not be considered on appeal. The Circuit Court of Appeals, during the hearing on said appeal, advised counsel for the Plaintiffs that a request should be made to trial court under Federal Rules of Civil Procedure 60 (b) for opportunity to submit the evidence pertaining to Grant Thorn's physical condition and the reasons for his failure to appear at the depositions.

Prior counsel for the Plaintiffs then proceeded with a Motion in the United States District Court for the Middle District of Pennsylvania under the aforesaid Federal

Civil Rule 60 (b) and evidence was produced concerning Mr. Thorn's physical condition and the reasons for his failure to appear at the depositions. The District Court dismissed the Motion for three reasons: (1) Plaintiffs' failure to set forth good ground to vacate or set aside the Court's Order for either inadvertance and/or excusable neglect; (2) Because the Motion was not timely filed; and (3) Because there was no leave of the United States Circuit Court of Appeals for the Third Circuit sought or granted in order to proceed in the District Court on the aforesaid Motion.

The United States Circuit Court of Appeals for the Third Circuit, by its opinion of April 8, 1964, (printed on Page 10 of the Appendix), and without discussing the important constitutional questions, affirmed the Order of the District Court by stating "that there is warrant on the record for the District Court decision".

The Appellants submit that the decision of the District Court (printed on Page 17 of the Appendix), which was affirmed by the United States Circuit Court of Appeals for the Third Circuit, was an arbitrary and capricious application of the Federal Rules authorized by the Constitution of the United States thereby depriving the Plaintiffs' of their rights of due process of law.

Without going into the merits of the Plaintiff's, Grant Thorn's, argument that he was not guilty of willful failure to appear at the depositions in question (which argument is not in our opinion proper in a Statement of Jurisdiction in the Supreme Court of the United States) and even assuming arguendo that the said Grant Thorn was guilty of the "willful failure" placing him in default under the Federal Rules of Civil Procedure, this default on part of

one of the Plaintiffs should not subject all of the other innocent Plaintiffs to a default order thereby depriving them of their constitutional rights to a hearing on the merits of their case.

The District Court in dismissing all of the Plaintiffs attempted to rule out the Plaintiffs argument and their evidence on the theory that the Plaintiffs did not apply to the Circuit Court of Appeals for permission before filing a motion under the Federal Rule of Civil Procedure 60 (b) in the Disfrict Court.

However, the attorney that represented the Plaintiffs at the time was under the impression that the Circuit Court of Appeals had granted such permission and furthermore (as discussed in 7 Moore's Federal Practice, Second Edition, Paragraph 60.30 (2) Page 339) there are times when the District Court has the power to proceed under 60 (b) without leave of the Appellate Court.

Without discussing the merits of the Plaintiffs' argument that their Motion under 60 (b) was timely filed, we feel that the Trial Court and the Appellate Court consideration of such issues was arbitrary, capricious, unsupported by law and evidence, unconstitutional, and thereby deprived the Plaintiffs of their rights to due process of law under the Constitution of the United States.

FEDERAL QUESTIONS ARE SUBSTANTIAL

The Appellants sincerely and respectfully submit and aver that a full consideration of all aspects of the case at bar will reveal a violation of the Constitution of the United States for the reasons and under the authorities previously cited in this Jurisdictional Statement.

The Appellants submit that this Appeal brings before the Court substantial Federal Questions which require plenary consideration, with briefs on the merits of the case, and oral argument for their resolution.

Respectfully submitted,

HARRY S. SHAPIRO,
Attorney for Appellants,
253 Equitable Building,
Baltimore, Maryland 21202.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

OPINION OF COURT

(Filed April 8, 1964)

PER CURIAM.

The first suit in this matter was filed September 20, 1955. Plaintiffs took no further steps concerning it for nearly four years and on June 17, 1959 it was dismissed for lack of prosecution. On September 30, 1958, just prior to the expiration of the applicable statute of limitations, the present action was filed. This sets out substantially the same cause as did the original complaint. After answer, plaintiffs made no move until May 17, 1960, when they had the case put on the trial list. On October 10, 1961, defendant noticed plaintiff Grant Thorn for a deposition, to be taken November 1, 1961. At the call of the trial list, an attorney said he had been informed Mr. Thorn was ill and would be unable to appear for the taking of his deposition on November 1, 1961. There was nothing filed in justification of this. Later Mr. Thorn was served with notice for the taking of his deposition on February 14, 1962. Thorn thereafter telegraphed that the deposition should be cancelled as he was ill and would not be present. Again, nothing was filed in support of such action. On March 2, 1962, defendant filed a motion to dismiss the complaint as to plaintiff Grant Thorn and a motion to dismiss the complaint for failure to prosecute. The motions were heard on April 6, 1962. All plaintiffs were in court with counsel. No counter affidavits or oral evidence was offered on behalf

of the plaintiffs. On April 26, 1962, a Memorandum of Decision and Order was filed by the court, dismissing the complaint as to Grant Thorn for wilful failure to appear for deposition after proper notice and as to all the plaintiffs for failure to prosecute. This was appealed. On February 28, 1963, this court affirmed. On April 24, 1963, plaintiffs filed a motion under F.R.C.P. 60(b) to set aside the district court order. That was heard and on June 26, 1963 the court entered a Memorandum of Decision denying the motion. It is from the latter that this appeal was taken.

Judge Follmer, in the district court, dismissed this motion for three reasons: plaintiffs' failure to set forth good ground to vacate or set aside the court's order for either inadvertence and/or excusable neglect; because the motion was not timely filed; because there was no leave of this court sought or granted to proceed in the district court on this motion which concerns the district court order of April 26, 1962, heretofore affirmed by this court. From our own study of this long drawn out litigation there is warrant in the record for the district court decision on all three of its stated grounds and the court was well within its discretion in so deciding.

The order of the district court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURTS OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,568

GRANT THORN, GENEVIEVE U. THORN; GRANT THORN, GENEVIEVE U. THORN and SAMUEL UHLFELDER, Directors in Trust for Stockholders, Members and Creditors of Eastern Tar Products Corporation; GRANT THORN, GENEVIEVE U. THORN and SAMUEL UHLFELDER, Directors in Trust for Stockholders, Members and Creditors of Eastern Road Materials Corporation,

Appellants,

vs.

HARRISBURG TRUST COMPANY,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: McLAUGHLIN, GANEY AND SMITH, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of June 26, 1963 of the said District Court in this case be, and the same is hereby affirmed, with costs.

ATTEST:
IDA O. CRESKOFF,
Clerk.

April 8, 1964

District Court's Memorandum of Decision of June 26, 1963.

(Filed June 26, 1963.)

MEMORANDUM

This matter is before the Court on motion of plaintiffs to vacate and set aside the final judgment entered against the plaintiffs herein on April 26, 1962, under Rule 60(b) of the Federal Rules of Civil Procedure on the ground that the cause of action was dismissed due to inadvertence and/or excusable neglect on the part of plaintiffs and specifically the extreme ill-health of plaintiff, Grant Thorn.

Plaintiffs appealed the above referred to Order of this Court dismissing the cause of action with prejudice and on February 28, 1963, the action of this Court was affirmed in a shortage *per curiam*.

Plaintiffs' motion must be refused for a variety of reasons.

(a). This Court is powerless to take any action respecting its Order of April 26, 1962, as affirmed by the Court of Appeals on February 28, 1963, without leave of the Court of Appeals.

7 Moore's F. P. 2d Ed., ¶ 60.30(2), at page 339, states:

> "Where the appellate court has affirmed or reversed, then relief by the district court under 60(b) must reckon with the appellate court's mandate. 'The authorities seem uniform that a mandate from a reviewing court is controlling as to all matters within the compass of such mandate and as to such matters the District Court, after remand, can take no further action.' At times a motion for relief will not raise matters that are within the compass of the mandate, and in that

event the district court clearly has the power to proceed with the 60(b) motion without leave of the appellate court. But where the action which the district court is asked to take under 60(b) would disturb the judgment which the appellate court's mandate ordered, or would otherwise be inconsistent with the mandate, the general doctrine is that the district court lacks power to proceed with the motion unless and until leave is granted by the appropriate appellate court. * * *"

Along the same line is the opinion of the Court in Butcher & Sherrerd *et al.* v. Welsh *et al.*, 3 Cir., 206 F.2d 259, 262 (1953), as follows:

"Respondent contends that recent amendments to Rule 60(b) of the Federal Rules of Civil Procedure confer upon the trial court the power to grant relief from the operation of a judgment without prior approval of the appellate court. We cannot subscribe to this contention. Rule 60(b), while enlarging the power of the District Courts over judgments without respect to the running of the term of court, does not confer upon District Courts the power to alter or amend a judgment which has been affirmed by this court or the Supreme Court, for such alteration would affect the decision of the reviewing court, which it is not within the power of the District Courts to do. * * * Further, we have already had occasion to hold that the 1948 amendments to the Rule, relied upon by respondent, did not change its effect in this respect. * * *"

In this case plaintiffs have not obtained, nor even sought to obtain, leave of the Court of Appeals to file the instant motion. The motion must be denied for this reason.

(b). Plaintiffs' motion has not been timely filed.

Rule 60(b) provides that a motion under reason (1) thereof seeking relief from an order or judgment because of inadvertence or excusable neglect, *inter alia*, "* * * shall be made within a reasonable time, and * * * not more than one year after the judgment, order or proceeding was entered or taken."

With respect to this time limitation, 7 Moore's F. P. 2d Ed., ¶ 60.28(2), pp. 319 and 320, states:

> "If a motion for relief under clause (1), * * * is not made within a reasonable time it will be denied, although made within the one year period. While the 'reasonable time' limitation may cut down the one year period, it cannot, however, enlarge that period, for a motion for relief under clause (1) * * * is subject to a maximum one year period, computed generally from the entry of the final judgment, and, in general, that time is not enlarged by the taking of an appeal."

In the event an appeal is taken and grounds then exist or are subsequently discovered which should be considered on an application for relief from the Order of the District Court under Rule 60(b), it has been held in this circuit that the proper procedure is the filing of a motion in the appellate court asking permission to submit to the trial court a motion under Rule 60 (b). Zig Zag Spring Co. v. Comfort Spring Corp., *et al.*, 3 Cir. 200 F.2d 901 (1953).

It is clear from the record in this case, from the affidavits submitted to the Court of Appeals and in support of the instant motion, that all of the facts upon which the instant motion is based were known to plaintiffs prior to the entry of the Order of dismissal by this Court on April 26, 1962.

On April 24, 1963, two days before the running of the maximum time within which a Rule 60(b) motion could be filed, plaintiffs filed the instant motion to vacate. In addition, the plaintiffs waited for two months after the filing of the *per curiam* opinion of the Court of Appeals (February 28, 1963) before filing the instant motion. Plaintiffs' history of inexcusable delay and complete disregard for the Court which was set forth in detail in our Memorandum of April 26, 1962, is continued in the present proceeding.

Plaintiffs have totally failed to justify their tardiness in filing the instant motion. It will be denied for this reason.

(c). In their motion or affidavits plaintiffs have failed to set forth good ground to vacate or set aside the Court's Order for either inadvertence and/or excusable neglect.

In Frank v. New Amsterdam Casualty Co., D. C. E. D. Pa., 27 F. R. D. 258, 259 (1961), Judge Lord said, "Defendant contends that its counsel's omission constitutes excusable neglect within the term of Fed. R. Civ. P. 60(b) (1). The Court finds that the defendant's view is untenable. An omission or any carelessness on the part of counsel does not automatically constitute 'excusable neglect' as the term is employed in Fed. R. Civ. P. 60(b) (1)." The Court then cites Ledwith v. Storkan, D. C. Neb., 2 F. R. D. 539 (1942), as the leading case on this matter as follows:

> "The leading case of Ledwith v. Storkan, *supra*, enunciates the basic proposition that the moving party must articulate the specific reasons which constitute excusable neglect. The defendant has only offered a general conclusion; it has not offered any extenuating circumstances or reasons surrounding counsel's failure to follow instructions. This Court therefore concludes

> that this omission, without a further showing of extenuation, does not constitute 'excusable neglect' within the purview of Fed. R. Civ. P. 60 (b) (1)."

In view of the long history of delays; failure to appear; disregard of all the rules not only of the Court but common ordinary decency as well; the withdrawal of their local counsel; the failure to follow through with explanations for nonappearance or delay; the failure of the other plaintiffs to act if the one vocal plaintiff, Grant Thorn, was too ill to act; Thorn's failure to make a timely application for continuance; failure of any of the plaintiffs to bring to the Court's attention, before or after the hearing on April 6, 1962, the material on which they now seek to rely; the failure on April 6, 1962, to request a continuance or at least to submit affidavits subsequent thereto, to characterize plaintiffs' conduct here even as "inexcusable neglect" is to grossly understate the facts. For this reason the motion to vacate must be denied.

Rule 30(b) of the Federal Rules of Civil Procedure provides, *inter alia*, as follows:

> "After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, * * * or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression."

As to the sanctions to be applied in case of the deliberate ignoring of this Rule, 4 Moore's F. P. 2d Ed., ¶ 30.16, p. 2044, states, "Nor may a party complain of the action of the court in imposing sanctions under Rule 37 for his failure to appear and give his deposition in response to a proper notice, where he has made no motion under Rule 30(b)."

Furthermore, Rule 30(b) provides that the motion for relief be "seasonably made." At page 2024, 4 Moore's F. P. 2d Ed., ¶ 30.05, the following statement appears, "'Seasonably' means as soon as the party or deponent learns that he will need a protective order of the court."

In the instant case this Rule was grossly violated.

Plaintiffs have also utterly failed to show any valid ground why the motion to dismiss for failure to prosecute under Rule 41(b) should not have been granted.

For the first time in this eight year litigation in their brief filed in the Court of Appeals plaintiffs asserted a reason for their failure to sooner prosecute their actions, to wit:

> "During the years 1952 to 1958, the Appellants were under a jeopardy tax lien with no evasion charged and no penalties assessed and in litigation with the Internal Revenue Service of the United States Government. Shortly before the tax lien matter was settled and shortly prior to the expiration of the applicable statute of limitations, the present suit was filed on September 30, 1958. During the next two years, conferences were held between counsel for each side and the parties, but efforts to work out a settlement proved unsuccessful." (Page 3).

Then at pages 16 and 17, plaintiffs state that:

> "* * * the long delay in the disposition of the matter was attributable to conditions beyond the control of the Appellants; firstly, the jeopardy tax lien which prevented them from prosecuting any civil action wherein money damages would result; and secondly, the ill health of the Appellant, Grant Thorn, who is the principal witness, for the Appellants."

Whether plaintiffs did or did not owe this tax of course is of no consequence here and requires no comment.

For the reasons above stated, plaintiffs' motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate and set aside final judgment will be denied.

/s/ FREDERICK V. FOLLMER,

United States District Judge.

June 26, 1963

* * * * * *

ORDER

NOW, June 26, 1963, in accordance with Memorandum this day filed, plaintiffs motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate and set aside final judgment entered by this Court against plaintiffs on April 26, 1962, be and the same is hereby denied.

/s/ FREDERICK V. FOLLMER,

United States District Judge.

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IN THE

Supreme Court of the United States

October Term, 1964

No. 557

GRANT THORN, GENEVIEVE U. THORN; GRANT THORN, GENEVIEVE U. THORN and SAMUEL UHLFELDER, Directors in Trust for Stockholders, Members and Creditors of Eastern Tar Products Corporation; GRANT THORN, GENEVIEVE U. THORN and SAMUEL UHLFELDER, Directors in Trust for Stockholders, Members and Creditors of Eastern Road Materials Corporation,

Appellants

vs.

HARRISBURG TRUST COMPANY,

Appellee

Appeal from The United States Circuit Court of Appeals for the Third Circuit.

APPELLEE'S MOTION TO DISMISS FOR WANT OF JURISDICTION

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OPINIONS BELOW

The appeal of Grant Thorn, et al., is taken from a decision of the United States Court of Appeals for the Third Circuit, rendered April 8, 1964. The case was docketed at No. 14,568. Both the Opinion and Order of the Court of Appeals are appended to the Jurisdictional Statement submitted October 2, 1964 by Appellant.

The appeal to the Court of Appeals was taken from a decision of the United States District Court for the Middle District of Pennsylvania, dated June 26, 1963. The case was docketed in the District Court at Civil Action No. 6420. The District Court's Memorandum and Order are reproduced in the appendix to Appellant's Jurisdictional Statement.

STATEMENT OF THE CASE

The tortured course of this litigation may be summarized as follows. Appellants first filed suit in 1955 and did nothing for four years. Shortly before this suit was dismissed for lack of prosecution and a few days prior to the running of the applicable statute of limitations in 1958, they filed another suit. Again, no action was taken until 1961.

In 1961 and 1962, Mr. Thorn refused to appear for depositions. Although ill health was subsequently alleged as the reason, no proof was offered. Nor was a motion filed seeking relief from his obligation to appear. In April, 1962, the suit was dismissed as to Grant Thorn for willful failure to appear, and, as to him and the other appellants, for failure to prosecute. The Court of Appeals affirmed.

In 1963, Appellants moved the District Court to set aside its dismissal order under FRCP 60(b). That Court refused to do so, giving three reasons:

(1) Appellants did not show that their failure to justify their conduct was due either to inadvertence or excusable neglect;

(2) Appellants' motion was not timely filed; and

(3) Appellants had not sought leave of the Court of Appeals, which had affirmed the District Court's order, before making their motion.

The heart of the District Court's reasoning was stated as follows (p. 6):

> "In view of the long history of delays; failure to appear; disregard of all the rules not only of the Court but common ordinary decency as well; the withdrawal of their local counsel, the failure to follow through with explanations for nonappearance or delay; the failure of the other plaintiffs to act if the one vocal plaintiff, Grant Thorn, was too ill to act; Thorn's failure to make a timely application for continuance; failure of any of the plaintiffs to bring to the Court's attention, before or after the hearing on April 6, 1962, the material on which they now seek to rely; the failure on April 6, 1963, to request a continuance or at least to submit affidavits subsequent thereto, to characterize plaintiffs' conduct here even as 'inexcusable neglect' is to grossly understate the facts. For this reason the motion to vacate must be denied."

The Court of Appeals affirmed on April 8, 1964. That ruling is the subject of this appeal.

MOTION TO DISMISS FOR WANT OF JURISDICTION

I. THIS APPEAL DOES NOT CONFORM TO THE SUPREME COURT RULES

Supreme Court Rule 16 authorizes a motion to dismiss where an appeal is not taken in conformity to this Court's Rules. This is the basis of the first part of Appellee's Motion To Dismiss.

Rules 10 through 18 of this Supreme Court's Rules prescribe the procedure on appeal. These Rules are brief and they are lucid. Nevertheless appellants have failed utterly to observe them.

Appellants' "Notice of Appeal" is governed by Rule 10, which requires filing in the court from which an appeal is taken. That court is the Court of Appeals of the Third Circuit. However, the Notice was inexplicably and improperly filed in the District Court for the Middle District of Pennsylvania.

Further, the Notice is totally deficient in content. It consists solely of the following request:

> "Mr. Clerk:
>
> "Kindly enter an appeal to the Supreme Court of the United States from the order dated April 8, 1964 of the United States Court of Appeals for the Third Circuit in the above matter."

There was not even an indication of who was taking the appeal!

More significantly, there was no specification of the statute under which the appeal was taken. Nor was there a designation of the portions of the record to be certified. Yet Rule 10 specifically requires a reference to the statute and a designation of the record. Finally, appellants completely ignored the requirement that the Notice contain a statement of the questions presented.

Perhaps the most serious defect was the failure to state the questions presented, the most important element of a notice. Rule 10 emphasizes the importance of this function by stating, inter alia, that "Only the questions set forth in the notice of appeal or fairly compromised therein will be considered by the court". This same principle is reiterated in Rule 15(1)(c)(2), where it is stated, that:

> "The phrasing of the questions presented need not be identical with that set forth in the notice of appeal . . . *but the jurisdictional statement may not raise additional questions of change the substance of the questions already presented.*" (Emphasis supplied.)

These are fatal errors. Rule 10 itself notes that "A failure to comply with these requirements will be a sufficient reason for dismissing the appeal." Rule 16 implements this by stating that a motion to dismiss may be based on the ground "that the appeal is not within the jurisdiction of this court, because not taken in conformity . . . to these rules."

This Court has frequently refused to consider appeals which did not conform to its Rules. In *Head v. New*

Mexico Bd. of Exam. in Optometry, 374 U.S. 424, 83 S. Ct. 1759 (1963), the Court quoted Rule 10 and refused to consider a question which was not reserved in the notice of appeal. Again, in *Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. 376, 80 S. Ct. 474 (1960), the Court excluded a question on appeal, on the ground that only issues properly raised in a jurisdictional statement could be considered. Similarly, this Court has refused to resolve issues raised on brief but not in the petition for certiorari. *Namet v. United States*, 373 U.S. 179, 83 S. Ct. 1151 (1963); *Local 1976 v. N.L.R.B.*, 357 U.S. 93, 78 S. Ct. 1011 (1958); *Irvine v. California*, 347 U.S. 128, 74 S. Ct. 381 (1954); *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 60 S. Ct. 569 (1940); *General Talking P. Corp. v. Western Electric*, 304 U.S. 175, 58 S. Ct. 849 (1938).

Three deficiencies were not cured by later filings. The Jurisdictional Statement does recite, for the first time, questions presented. But, as noted, it cannot raise questions not presented by the Notice of Appeal. Nor can appellants' tardy filing of a Designation of the Record cure the Notice of Appeal by indiscriminately designating, one month too late, *everything* as certified.

The failure of Appellants to observe the Rules of this Court should not be condoned. Certainly, proper procedure is essential to the orderly administration of justice. Especially is this true where, as here, Appellants' failure is just a continuation of a pattern of disregard for orderly process, persisted in since 1955 and severely criticized by the Courts below. Accordingly, this appeal should be dismissed.

II. THIS APPEAL IS NOT IN CONFORMITY TO STATUTE

Supreme Court Rule 16(a) authorizes a motion to dismiss where an appeal is not taken in conformity to statute. This is the basis for the second part of Appellee's motion to dismiss.

It is impossible to determine from Appellants' pleadings what is the alleged statutory basis for this appeal. The Notice of Appeal indicates no basis whatsoever. The Statement of Jurisdiction (p. 1) relies solely on "26 statutes at large Chapter 517, Page 827 (1891) of the Acts of Congress of the United States."

But the only act which appears at that citation is one continued from the preceding page, dealing with the establishment of Circuit Courts of Appeal. According to Shepard's United States Citations, several portions of this Act have been repealed. The only portions which remain in the United States Code are §§ 2, 9, 10 and 11. Section 2 is incorporated in 28 U.S.C.A. §§ 1913, 604, 711, 961 and 962; §§ 9 and 10 appear in 28 U.S.C.A. §§ 604, 713 and 2106; and § 11 appears in F.R.C.P. 73 and 28 U.S.C.A. § 2107.

Reference to these provisions reveals that they deal primarily with administrative aspects of the Court functions, such as clerks, criers, and librarians. 28 U.S.C.A. § 2106 does describe the powers of appellate courts in dealing with lower court cases. And both 28 U.S.C.A. § 2107 and 73 F.R.C.P. deal with procedure on appeal

to a Court of Appeals. But neither deals with appeals to this Supreme Court.

Sections 5 and 6 of the statute cited did deal with appeals to the Supreme Court. But these have been supplemented or superseded by more recent provisions governing such appeals, as indicated by the notes accompanying sections 1252-1257 in 28 U.S.C.A. See also, e.g., *Fay v. Noia*, 372 U.S. 391, 413, 83 S. Ct. 822, 835, note 26, (1963).

The general provisions governing this Court's jurisdiction are 28 U.S.C.A. § 1251, et seq. None authorizes this appeal. Section 1251 deals with original jurisdiction only. Section 1252 allows appeals from a court decision holding an Act of Congress unconstitutional. Section 1253 involves appeals from a ruling by a three-judge court on injunctions. Section 1254(2) permits appeals where a state statute has been declared contrary to federal law. Section 1257 allows appeals from a state court in certain instances, and Section 1258 does the same with the Supreme Court of Puerto Rico.

There is, therefore, no statutory basis for this appeal. Accordingly, it should be dismissed.

III. THIS APPEAL DOES NOT RAISE SUBSTANTIAL FEDERAL QUESTIONS REQUIRING FURTHER ARGUMENT

Supreme Court Rule 16(b) and (c) provide that this Court will dismiss an appeal, and affirm the judgment

below, where the questions presented are so unsubstantial as not to warrant further argument. This is the basis of the third part of Appellee's motion to dismiss.

It is difficult to ascertain exactly what question is presented. None is mentioned in The Notice of Appeal. And the Jurisdictional Statement is so vague as to be uninformative.

Such vagueness, without more, is grounds for dismissal: *Van Stone v. Stillwell and Bierce*, 142 U.S. 128, 12 S. Ct. 181 (1891). As this Court said in *Seaboard Air Line Ry. Co. v. Watson*, 287 U.S. 86, 91, 53 S. Ct. 32, 34 (1932):

> "It is essential to a proper presentation of points relied on for reversal that the statute and rules of court requiring and governing the forms of assignments of errors be complied with. Every appeal must be accompanied by an assignment of errors which shall set out separately and particularly each error asserted. The purpose is to enable the court, as well as opposing counsel, readily to perceive what points are relief on. The substitution of vague and general statement for the prescribed particularity sets the rule at naught. Phillips etc. Const. Co. v. Seymour, 91 U.S. 646, 648, 23 L. Ed. 341; Briscoe v. Dist. of Columbia, 221 U.S. 547, 549-550, 31 S. Ct. 679, 55 L. Ed. 848. And, as the rule makes for convenience and certainty in the consideration of cases, the court may, and generally it will, disregard a specification that is so uncertain or otherwise deficient as not substantially to comply with the rule, even if the opposing party raises no question, and treats it as adequate.

A reading of the Jurisdictional Statement suggests that, at best, the questions are as follows:

1. Was Grant Thorn guilty of willful failure in not appearing for the depositions requested by Appellees?

This question was thoroughly considered by both courts below. Both responded in the affirmative. That response was correct.

Mr. Thorn twice refused to appear for depositions. Although the alleged excuse was ill health, he offered no proof—*not even a doctor's affidavit*—either time. Nor was there ever a motion under F.R.C.P. 30(b) for appropriate relief. And on Appellee's motion to dismiss because of willful failure to appear, no proof of justification was offered although *both Thorn and his doctor were in court* during the argument!!

In any event, the question is not properly before this Court. It could have been raised by certiorari or appeal following the Court of Appeals' decision. Instead, Appellants chose to return to the District Court to file a motion under F.R.C.P. 60(b), which is the subject of this appeal. Thus, Appellants can not now seek review of the District Court's determination that Thorn willfully failed to appear at the depositions.

2. Should the District Court have granted relief under F.R.C.P. 60(b), vacating the dismissal of Appellants' suit, after the Court of Appeals had affirmed that dismissal?

F.R.C.P. 60(b) permits a court to "relieve a party or his legal representative from a final judgment" where the party has been guilty of "inadvertence" or "excusable

neglect". At no time have Appellants demonstrated that this was the case.

Rather, their motion merely attempted to explain Thorn's refusal to appear for the depositions. But the issue under F.R.C.P. 60(b) is not *why* Thorn failed to appear. Rather, it is why he *failed to justify that conduct* when given the opportunity to do. Certainly the opportunities were there: at the time of the depositions, by motion under Rule 30 or even as late as the hearing on the motion under F.R.C.P. 60(b). But never did Thorn explain his failure to produce evidence excusing his conduct.

Thus, Appellants really can say only that they chose to ignore federal procedure and now wish to escape the consequences. However, such conduct was properly grounds for dismissal of their claim: *Collins v. Wayland*, 139 F. 2d 677 (9th Circuit, 1944), cert. denied 322 U.S. 744 (1944); *Dictograph Products v. Kentworth Corporation*, 7 F.R.D. 543 (D.C.W.D. Ky., 1947); *Loosley v. Stone*, 15 F.R.D. 373 (D.C.S.D. Ill., 1954). And the mere desire to escape the consequences of their conduct is not grounds for relief under Rule 60(b). See, e.g., *Flet v. W. A. Alexander & Company*, 302 F. 2d 321 (7th Cir., 1962); *Frank v. New Amsterdam Cas. Co.*, 27 F.R.D. 258 (D.C. E.D. Pa., 1961); and *Ledwith v. Storkan*, 2 F.R.D. 539 (D.C. Neb., 1942).

Even if Thorn's failure to appear had been excusable, and even if Appellants' motion under 60(b) had attempted to show this, the motion was still properly denied as being too late. Such a motion must be made within a reasonable

time. F.R.C.P. 60(b). But appellants' delay, in waiting nearly a year, was not reasonable.

The basis of Appellants' motion existed well before the verdict of dismissal, since the excuse was Thorn's illness at the time of deposition-taking. Thus, a motion for relief under Rule 60(b) was in order following the District Court's dismissal of the action. Instead, Appellants appealed. Certainly, the motion should have been presented immediately after the Court of Appeals affirmed the lower court. Instead, Appellants delayed two months, until the very end of the permissible period, before submitting their motion.

These delays have never been explained. Nor can they be. They are part and parcel of the whole pattern of delay by Appellants in this case. They waited three years to sue, did nothing for four years, filed another (the present) suit, and did nothing until it was dismissed. Thorn failed twice to appear for depositions. Appellants filed an appeal only two days before the expiration of the appeal period, sought a continuance to file briefs and, *even then, filed briefs two days late.* And then they moved under Rule 60(b) in the District Court two days before the end of the year accorded them for such motions —and two months after the Court of Appeals denied their appeal.

Such delay is incredible and unjustified. Nothing in the record warrants a contrary finding. Certainly the two courts below could reasonably find that the delay in filing the motion under 60(b) was unreasonable. See, e.g., *Mayfair Extension, Inc. v. Warren E. Magee*, 241 F. 2d 453 (1957), and *In Petition of Oskar Tiedemann and Company*, 183 F. Supp. 129 (D.C., Del., 1960).

In any event, the motion under Rule 60(b), in addition to its other defects, was not properly before the District Court. This was because Appellants did not seek leave of the Court of Appeals before asking the District Court to set aside the verdict affirmed by the higher court. Therefore, the District Court properly denied the motion: 7 Moore's Federal Practice, Paragraph 60.30(2), p. 339, *Butcher and Sherrerd v. Welsh*, 206 F. 2d 259 (3rd Cir., 1953).

Both Questions 1 and 2 have been answered many times by the federal courts. Neither of the courts below had any difficulty in resolving them. Certainly, they do not present the substantial issues which are appropriate for resolution by this Court.

IV. THIS APPEAL RAISES A QUESTION NOT PROPERLY BEFORE THIS COURT BECAUSE APPELLANTS DID NOT PRESENT IT TO THE COURT BELOW

Supreme Court Rule 16(b) authorizes a motion to dismiss where an appeal presents questions "not timely or properly raised". Such questions include those raised for the first time in the Supreme Court. This is the basis for the fourth part of Appellee's motion to dismiss.

The question involved is not clearly articulated by Appellants' Jurisdictional Statement. However, it is suggested at pp. 5-6 and may fairly be set forth as follows:

> *"Can the misconduct of one plaintiff subject the others to sanctions?"*

This question was never raised in either of the courts below. Certainly, it is not dealt with in any of their opinions. Nor was it argued in Appellants' briefs.

The question has been present throughout the case. Many opportunities have existed in this protracted litigation to raise it: at the hearing on dismissal, on the first appeal, on the motion to vacate under Rule 60(b), and on the second appeal which is now brought to this Court. Appellants may not now raise it, for the first time, in this Court: *Federal Trade Commission v. Travelers Health Association*, 362 U.S. 293, 80 S. Ct. 717 (1960); *Lawn v. United States*, 355 U.S. 339, 78 S. Ct. 311 (1958); *Ellis v. Dixon*, 349 U.S. 458, 75 S. Ct. 850 (1955); *Walters v. City of St. Louis, Mo.*, 347 U.S. 231, 74 S. Ct. 505 (1954).

Further, the question is not so substantial as to require this court's attention. Grant Thorn was clearly the spokesman for Appellants. It was ostensibly his property that was involved. In reality, there was but one plaintiff here and he, quite properly, is bound by his own actions.

If the contrary is assumed, then the other two Appellants should have acted individually and independently. Instead, *for nearly a decade* they did nothing. Their failure to act was their choice and they must suffer the consequences. The District Court dismissed this action as to them for failure to prosecute, an action clearly warranted. Appellants never questioned, by appeal or otherwise, the propriety of this ruling.

They may not do so now.

CONCLUSION

This litigation has dragged on for years. All the delays have been caused by Appellants' indolence and errors. The courts below clearly recognize this and took the proper action: dismissal and a refusal to vacate that dismissal.

This Court should not now condone Appellants' dilatory actions. Nor should it waste its valuable time on unsubstantial questions or questions raised now—after years of opportunity—for the first time. Particularly is this so when there is no statutory basis for this appeal.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 557

GRANT THORN, GENEVIEVE U. THORN; GRANT THORN, GENEVIEVE U. THORN and SAMUEL UHLFELDER, Directors in Trust for Stockholders, Members and Creditors of Eastern Tar Products Corporation; GRANT THORN, GENEVIEVE U. THORN and SAMUEL UHLFELDER, Directors in Trust for Stockholders, Members and Creditors of Eastern Road Materials Corporation,

Appellants,

vs.

HARRISBURG TRUST COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS FOR WANT OF JURISDICTION

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APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS FOR WANT OF JURISDICTION

The Appellants believe that they have briefly and succinctly set forth grounds for jurisdiction of this Appeal in their Jurisdictional Statement heretofore filed in this matter. Therefore, it is not our purpose to be repetitious herein.

However, the Appellee's angry reference in their Motion to Dismiss to the "tortured course of this litigation" needs some response. The record in this case clearly reveals that if this case had been delayed by the Appellants herein, and the Plaintiffs below, it had also been delayed by the Appellee herein, the Defendant below, in that said Defendant had never asked for a trial date and never attempted to take the deposition of any of the Plaintiffs in this case other than the Plaintiff, Grant Thorn, who had been physically disabled.

With reference to the procedure followed under this Appeal, counsel for the Appellants has attempted to follow instructions given by the experienced clerk of the United States Court of Appeals for the Third Circuit. If any technicality has not been followed, and the Appellants say that the Appellee is in error in this objection, the Appellee has failed to show that such omission has been prejudicial to it in this case.

The Apellee, in its Motion to Dismiss, has laid great stress upon sections of the United States Code. However, the sections of the law, relied upon by the Appellants for jurisdiction in this case in the Supreme Court, are not in the United States Code but are in the Statutes at Large of the Acts of Congress of the United States.

The Appellee has stated that it does not believe that the questions presented by this Appeal are substantial. However, we believe that due process of law under the Constitu-

tion of these United States is a sacred liberty worth protecting and worth fighting for.

The Appellee has stated that the Appellant, Grant Thorn, "offered no proof—not even a doctor's affidavit—either time"; but this allegation is not supported by the real facts.

Finally, the Appellee has argued that the Appellants have raised the question of due process of law for the first time in this Court. However, this is not true. Although present counsel for the Appellants was not present for any hearings prior to the last hearing before the United States Court of Appeals for the Third Circuit, the issue involving the judgment by default against all of the Plaintiffs as a result of one of the Plaintiff's failure to appear for a deposition was argued strenuously by this writer at said hearing although not treated with great detail in the brief. In addition, this problem was treated by the lower courts repeatedly and their ultimate decision did, in fact, bar all of the Plaintiffs from their day in court because of the alleged default of one of the Plaintiffs.

We firmly and sincerely believe that justice under the Constitution of the United States of America is crying out for consideration of this case by the Supreme Court.

Respectfully submitted,

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